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No. 86-267

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAVEN'S HOLLOW, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' refusal to vacate a district court order entered in 1979 pursuant to Fed. R. Crim. P. 6(e), which authorized the disclosure of grand jury materials to the Internal Revenue Service for use in determining and litigating petitioners' civil tax liabilities.

1. a. In 1978, a federal grand jury sitting in the Eastern District of Virginia began an investigation of petitioners. During that investigation, petitioners and related persons and entities produced voluminous financial records for examination by the grand jury (C.A. App. 31-32). Various persons testified before the grand jury during the course of the investigation.

Petitioner Head was indicted, was tried twice, and was ultimately convicted on one count of conspiracy to commit bribery and tax evasion and on one count of making an illegal gratuity.[1] Pet. App. 2a, 7a.

At the conclusion of the first trial in November 1979, the government sought and obtained from the district court an order, pursuant to Fed. R. Crim. P. 6(e), authorizing the disclosure of grand jury materials to the Internal Revenue Service (IRS) to determine whether petitioners owed additional taxes and whether petitioner Airlie Foundation was entitled to retain its tax-exempt status (C.A. App. 35-36, 40-41).[2] The government's application for the Rule 6(e) order met the standards then prevailing in the Fourth Circuit for the disclosure of grand jury materials to the IRS (Pet. App. 6a).[3] Review of petitioner's civil tax deficiencies is currently pending before the Tax Court, and petitioner Airlie Foundation's tax exempt status is still under consideration by the IRS.

Counsel for petitioners have to the best of our knowledge received access to all of the documents subpoenaed by, and all of the testimony before, the grand jury that was disclosed to the IRS and that is

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[1] See *United States* v. *Head*, 641 F.2d 174 (4th Cir. 1981); *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).

[2] The district court issued an original order (C.A. App. 35-36) and an order on the government's motion for clarification (*id.* at 40-41). Although the government filed both motions *ex parte*, petitioners were aware of and opposed the government's initial motion (*id.* at 134-136).

[3] See *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); *In re December 1974 Term Grand Jury Investigation*, 449 F. Supp. 743 (D. Md. 1978).

relevant to these proceedings. Portions of these materials were made available to counsel for petitioner Head in connection with his criminal trials, and substantial amounts of grand jury materials were introduced into evidence at those trials. Pet. App. 2a, 7a; C.A. App. 23-30. Counsel for petitioners were also given access to grand jury materials in the IRS' possession in connection with the Tax Court proceedings (see C.A. App. 42-49, 58-59, 84-86, 89-101, 165-180, 190-194, 197-198, 211).[4]

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[4] Before trial in the criminal proceedings against petitioner Head, the government disclosed: (1) the documents the government intended to introduce in its case-in-chief; (2) the exhibits supporting the charges in the indictment; (3) an inventory of records and documents obtained by the government prior to the issuance of grand jury subpoenas; (4) all grand jury transcripts of 13 government witnesses, and portions of the transcripts of another witness; (5) trial transcripts of seven witnesses and the congressional testimony of another witness; and (6) all of the Federal Bureau of Investigation (FBI) and IRS witness interview reports relevant to the charges in the indictment. C.A. App. 23-26. Numerous grand jury materials were thereafter introduced at petitioner Head's trials.

In 1981, petitioners filed a motion pursuant to Rule 6(e) seeking the disclosure of: (1) all documents submitted to and testimony before the grand jury; (2) a complete list of grand jury witnesses; (3) witness interview reports prepared by the FBI that were submitted to the grand jury; (4) the summary report and appendices prepared by an IRS agent and submitted to the grand jury; and (5) witness interview reports prepared by the IRS before and during the grand jury investigation. See C.A. App. 44, 57-58. Petitioners' motion was granted in part and denied in part. Petitioners were granted access to all books and records that they had submitted to the grand jury (*id.* at 59; see also *id.* at 84-101). Petitioners were granted access to the books and records of third parties insofar as the IRS relied on these items in the civil or administrative proceedings; otherwise, petitioners' motion for disclosure

b. Almost five years after entry of the 1979 order, in December 1984, petitioners moved to vacate the Rule 6(e) order and to prohibit the IRS from using any grand jury materials obtained pursuant to the order (C.A. App. 102-110). Relying on *United States* v. *Baggot*, 463 U.S. 476 (1983) (Rule 6(e) does not authorize disclosure of grand jury material to the IRS to determine tax liabilities), and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) (the government must establish a particularized need for grand jury materials to obtain disclosure under Rule 6(e) for use in a civil suit), petitioners argued that the district court's 1979 Rule 6(e) order should be

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of these documents was denied (*id.* at 59). Petitioners' motion for disclosure of the FBI and IRS witness interview reports was denied on the ground that these items were not grand jury materials (*ibid.*). The government voluntarily disclosed numerous IRS witness interview reports, however (*id.* at 46), and, as noted above, the government had disclosed the FBI and IRS witness interview reports to petitioner Head during his criminal prosecution (*id.* at 25, 26). Although petitioners' motion was denied in part, we are informed by the United States Attorney's Office and the IRS's Chief Counsel's Office that all grand jury materials that were relevant, respectively, to petitioner Head's criminal prosecution or to the ongoing civil or administrative proceedings have been disclosed to petitioners.

Petitioners' contention (Pet. 7 n.6) that there is no support in the record for the court of appeals' statement (Pet. App. 7a) that all of the grand jury materials possessed by the IRS have been disclosed to the public or to petitioners, puts the matter the wrong way around. It is clear that an enormous quantity of grand jury materials has been so disclosed. Petitioners have not identified—and we are not aware of—any materials they have not obtained that are relevant to the ongoing tax proceedings.

revoked and the government should be forbidden from using any of the materials it had obtained.

The district court denied petitioner's motion (C.A. App. 120). The court found that "the equities favor[ed] the government," which had relied in good faith on the 1979 order and had used the grand jury materials for nearly five years (Pet. App. 11a; C.A. App. 126). The court also concluded that *Sells* and *Baggot* should not be given retroactive effect (Pet. App. 12a).

c. The court of appeals, by a divided vote, affirmed (Pet. App. 1a-8a; 783 F.2d 450). The panel unanimously agreed that *Sells* and *Baggot* should not be applied retroactively (*id.* at 6a-7a; *id.* at 7a-8a (Butzner, J., dissenting)). The panel majority concluded that modification of the 1979 order was unnecessary, because the order was valid when it was entered (*id.* at 6a-7a). The dissenting judge believed that the government should be required to meet the standards imposed by *Baggot* and *Sells* in order to make future use of the grand jury materials (*id.* at 8a).

2. The question presented by this case is one of small and diminishing importance. Moreover, it is a question that turns on the facts and circumstances of each case—"the equities"—and which was correctly answered in this case. Further review is therefore not warranted.

a. Petitioners do not contend that the 1979 order was not sought and issued in good faith based on then prevailing standards and observed in good faith for nearly five years thereafter. And petitioners do not here challenge the court of appeals' ruling that *Sells* and *Baggot* do not apply retroactively. Their sole contention is that pre-*Sells* and *Baggot* Rule 6(e)

orders should now be prospectively vacated unless the orders could be issued today under the rules announced in those cases. But even if that contention were susceptible to a single yes-or-no answer applicable to every case, it would apply only to a small, closed, and diminishing category of cases involving Rule 6(e) orders entered before the 1983 decisions in *Sells* and *Baggot* that remain partially executory.[5] The contention is therefore at best of limited significance that does not warrant review by this Court.

b. A Rule 6(e) order that was properly issued and subsequently relied on in preparing a civil case should be vacated only when there has been a showing—not made here—that a failure to vacate the order would be inequitable. *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), does not, as petitioners suggest, stand for the stunning proposition that every valid executory court order must be vacated or modified whenever there is a change in the law that would preclude its issuance as an original matter. To the contrary, the Court carefully noted that "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances" (*id.* at 647-648) and that because there is "such a balance of imponderables there must be wide discretion in the District Court" (*id.* at 648). Modification is required only "when a change in law or facts has made inequitable what was once equitable" (*id.* at 652). In *Wright*, a consent decree prohibiting certain private conduct that was unlawful when the decree was en-

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[5] A final judgment in a civil case cannot be retrospectively challenged on the basis of a subsequent decision. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

tered was ordered modified when Congress legalized the conduct in question. Continued application of the decree would have imposed a no longer appropriate burden on the parties subject to it.

c. The decisions in *Sells* and *Baggot* do not require the prospective vacation of the Rule 6(e) order entered in this case either to vindicate the public policies underlying those decisions or to eliminate any actual unfairness to petitioners.

First, as noted, the materials in question were disclosed to the IRS pursuant to a disclosure order that petitioners concede was valid when entered and was not retroactively invalidated by *Sells* or *Baggot*. There is no suggestion of improper government conduct that needs to be remedied. Cf. *Gluck* v. *United States*, 771 F.2d 750, 757-758 (3d Cir. 1985) (upholding summons issued in good-faith reliance on a validly entered pre-*Baggot* Rule 6(e) disclosure order); *United States* v. *Leon*, 468 U.S. 897 (1984). To the contrary, the only effect of vacating the order here would be to delay and complicate tax proceedings prepared in good faith over a five-year period while the courts below sort out the effect of vacation of the order.[6]

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[6] This case does not, in its current posture, present the question involved in *United States* v. *John Doe, Inc. I*, cert. granted, No. 85-1613 (May 27, 1986): whether continued use of grand jury materials by the same personnel constitutes a "disclosure" of those materials requiring a Rule 6(e) order. If the Rule 6(e) order were to be vacated in this case, we believe it very possible that the courts below would eventually conclude that such vacation has no effect on continued use of the materials, because they are in fact all public (see page 9 note 8, *infra*), or because no disclosure is involved. Substantial proceedings would obviously be necessary before such a determination could be made.

Second, prospective vacation of pre-1983 Rule 6(e) orders is obviously not necessary to protect the public policies underlying the decision in *Sells*: enhancing the willingness of grand jury witnesses to come forward and testify fully and candidly, and preventing the improper use of the grand jury for civil discovery purposes. See *Sells*, 463 U.S. at 432-433. Those interests are safeguarded by applying the standards adopted in *Sells* and *Baggot* to future disclosure applications.[7]

Third, there is no need to vacate the 1979 order to avoid prejudice to petitioners. Through discovery in petitioner Head's criminal prosecution or during the ongoing civil proceedings, petitioners obtained all relevant grand jury materials that were disclosed to the IRS under the 1979 Rule 6(e) order. The government therefore does not have " 'exclusive access to a storehouse of relevant fact' " (*Sells*, 463 U.S. at 434 (citation omitted)). Petitioners will be in the same position as the government if the 1979 order is left in place.

Finally, vacating the 1979 disclosure order could significantly prejudice the government's opportunity to complete the on-going civil and administrative proceedings. The government reasonably relied on these materials in preparing for and developing those proceedings. Vacating the 1979 Rule 6(e) order would,

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[7] Indeed, since petitioners obtained the grand jury materials (see pages 3-4 note 4, *supra*), they are in no position to champion the public interest in secrecy at this late date in this proceeding. *Raphan* v. *United States*, 759 F.2d 879, 887 (Fed. Cir. 1985), cert. denied, No. 85-11 (Oct. 7, 1985); cf. *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895) (parties should not be permitted to take inconsistent positions in the same case).

at a minimum, force the government to establish its right to use the materials without a Rule 6(e) order[8] or to reacquire these materials through civil discovery, under the IRS's subpoena power, or through a new Rule 6(e) order. At worst, the government could be denied the opportunity to obtain these materials at all, on the ground that the IRS's efforts to reac-

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[8] In fact, we believe the courts would eventually rule that the government (and the petitioners) may now use any of the materials in question without a Rule 6(e) order because they have properly lost their confidentiality. All grand jury materials introduced into evidence at trial are now judicial records and are not protected by Rule 6(e). *United States* v. *Manglitz*, 773 F.2d 1463, 1467-1468 (4th Cir. 1985) (*Sells* does not require a district court to seal the record of a guilty plea proceeding because grand jury material is introduced absent proof that the government has sought to manipulate the proceeding to reveal grand jury materials); see, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597-599 (1978) (common law grants a right of access to judicial records); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-497 (1975) (First Amendment right to publish information lawfully acquired during court proceedings); see generally *United States* v. *Manglitz*, 590 F. Supp. 177, 178-179 (D. Md. 1984), aff'd, 773 F.2d 1463 (4th Cir. 1985) (prosecution does not need a Rule 6(e) order to introduce grand jury materials at trial) (collecting authorities). Similarly, no limitation was placed on the use that petitioners could make of the materials disclosed to them under their Rule 6(e) request or in discovery in petitioner Head's criminal trials (see C.A. App. 204). (In fact, certain grand jury materials disclosed to petitioner Head during his criminal prosecution were apparently revealed by him to the media, see C.A. App. 137-138.) There is, accordingly, no longer any secrecy interest in those materials that would be protected by Rule 6(e). See Fed. R. Crim. P. 6(e)(3)(C) (district court may impose conditions on disclosure of grand jury materials); cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) (courts may limit the public disclosure of information obtained in pretrial discovery).

quire these materials are "tainted" by the knowledge it obtained from its current use of them. Petitioners have offered no reason why they should be allowed to obtain such an inequitable litigating advantage in these proceedings.[9]

In sum, in these circumstances it would be a decision to revoke the 1979 Rule 6(e) order, not the district court's ruling below, that would serve as " 'an instrument of wrong' " (*System Federation No. 91* v. *Wright*, 364 U.S. at 647 (citation omitted)). The district court therefore did not err in refusing to vacate the 1979 Rule 6(e) order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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[9] The decision below does not conflict with *In re Sells*, 719 F.2d 985 (9th Cir. 1983) (*Sells II*), upon which petitioners rely. Unlike this case, *Sells II* involved a direct appeal from a Rule 6(e) order, entered before *Baggot* was decided, that was held on appeal until that decision was announced. Applying the rule that an appellate court must apply existing law (*e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969)), the court of appeals held that the Rule 6(e) order must be set aside under *Baggot*. The court also concluded that the application of *Baggot* to that order would not result in a "manifest injustice" (719 F.2d at 990; see *id.* at 990 & n.3). For the reasons discussed in the text, the equitable considerations in this case are quite different.

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